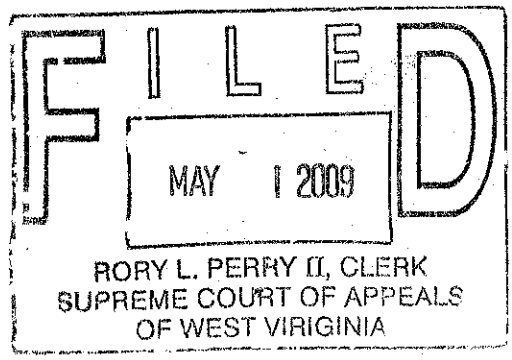
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 34738



LOIS ARNOLD
Appellee, Plaintiff Below

v.

DAVID G. PALMER, Trustee, CHRISTINA J. PALMER, Trustee, ADVANTAGE BANK, An Ohio Corporation, and JEFFREY SCOTT ARNOLD, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased,
Defendants Below

Civil Action No. 07-C-699
Circuit Court of Wood County
Beane, J., Judge

ADVANTAGE BANK,
Appellant, Third-Party Plaintiff Below,

v.

JEFFREY SCOTT ARNOLD, Individually, SAMANTHA NICHOLLE FOGGIN, MELISSA ANN DAILEY, and KELLI BETH ARNOLD, Beneficiaries of the Estate of Jeffrey A. Arnold, Deceased,
Appellees, Third-Party Defendants Below.

RESPONSE BRIEF ON BEHALF OF JEFFREY SCOTT ARNOLD, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JEFFREY A. ARNOLD, DECEASED

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II. INTRODUCTION

Now comes Appellee Jeffrey Scott Arnold, Executor of the Last Will and Testament of Jeffrey A. Arnold, deceased (hereinafter referred to as "the Estate") and submits this Brief of Appellee seeking this Honorable Court affirm the Honorable J. D. Beane's order of August 18, 2008 denying Appellant's Motion for Summary Judgment. Herein, the Estate respectfully submits that Judge Beane's Order is correct under this Honorable Court's previously established case law and statutory law in the state of West Virginia and that the underlying ruling was well-reasoned and in compliance with West Virginia real property and probate law.

The Estate further urges that this Honorable Court not be swayed by Advantage Bank's (hereinafter referred to as "Appellant") unfounded suggestion that the lower court's ruling will have a "cataclysmic" impact upon lender's throughout Wood County, or that there are thousands or even hundreds of Deeds of Trusts in Wood County that would simply become unenforceable. Except for similar situations that fall under these very narrow factual circumstances, it is simply untenable that there will be such a cataclysmic impact. Especially, in light of the fact that absolutely no evidence was proffered in the lower court in regard to these allegations.

Furthermore, Appellant should be precluded from raising any argument based upon federal banking regulation 12 CFR § 202.7 (hereinafter referred to as "Reg B.") since this issue was not raised in any arguments before the Circuit Court nor any of the documents certified as part of the Appellate record. To the extent that the Amicus Brief discusses this same argument and also attempts to offer evidence that has not been previously vetted by the trial court process, such arguments and evidence should be disregarded for the same reasons as previously stated herein.

However, Reg. B would not be dispositive in the matter at hand anyway. The issue is a West Virginia state law issue and not determined by federal regulations. While it is true that Reg. B governs the actions of the banking industry, Reg. B contemplates that state law governs the transaction and on its face allows for the bank to take the steps that are necessary under state law to secure any loan. Accordingly under Reg B, the bank may require execution of any documents necessary under state law to perfect its interest in pledged collateral. Therefore, Reg. B and all of the issues raised in its regard do not add any additional insight necessary to the determination of this case.

III. KIND OR PROCEEDING AND THE NATURE OF THE RULING BELOW

The Appellee-Plaintiff, Lois Arnold (hereinafter referred to as "Appellee") filed her complaint for injunctive relief against Appellant and its' Trustee and the Executor of the Estate on November 13, 2007. Therein, Appellee sought a temporary and permanent injunctive order, seeking to: 1) preclude Appellant's Trustees from foreclosing on Appellant's Deed of Trust and 2) compel the Estate to satisfy any remaining obligations under the Deed of Trust such that Appellee "may be secure and unmolested in the use, possession and ownership of the real estate involved herein." (Complaint, P. 11).

Upon Appellant having failed to file an Answer to the *Complaint for Injunctive Relief*, on December 26, 2007, Judge Beane entered a Default Order against Appellant. Subsequently, upon a motion filed by Appellant, the Court ruled and entered an *Order* vacating the Default Judgment and allowing the Appellant to file its' *Answer to Complaint for Injunctive Relief.*

Appellant filed its *Answer to Complaint for Injunctive Relief* and iterated claims against any distributions made by the Estate, pursuant to W.Va. Code § 44-2-26 and 44-2-27, via *Counterclaim, Cross-Claim and Third-party Complaint.*

No discovery had yet been conducted by any party, prior to the Appellant filing its *Motion for Summary Judgment* on March 28, 2008. In fact, the court had not yet set a scheduling order. Counsel for the Estate filed a Response to Motion for Summary Judgment. Counsel for Appellee did not file a written response, but did make an appearance and orally responded to the *Motion for Summary Judgment* at the hearing.

The Circuit Court heard Appellant's *Motion for Summary Judgment* on April 17, 2008, with all parties in attendance by their respective counsel. On August 18, 2008, the Circuit Court entered an Order denying Appellant's *Motion for Summary Judgment.*

IV. STATEMENT OF FACTS

Appellee is the fee simple owner of residential real property located in the District of Clay, Wood County, West Virginia. Appellee's ownership arises by virtue of a Deed bearing the date of November 3, 1998 from Jeffrey A. Arnold and Lois Lynn Arnold, husband and wife, to the same as joint tenants with rights of survivorship. (Complaint, P.2 ¶ III).

On November 5, 2003, Jeffrey A. Arnold executed a promissory note in the original principal sum of $128,000 (the "Note"). (Complaint, P. 4 ¶ VI). Thereafter, Appellee and her husband, Jeffrey A. Arnold (the "Decedent"), executed a Deed of Trust in favor of Debora K. Martin Lee, Appellant's Trustee. This Deed of Trust secured the real property at issue as collateral for the repayment of the Note. (Complaint, P. 3 ¶ IIII). There was absolutely

no evidence, nor was any ever offered, that the Appellant herein, requested the Appellee, Lois Arnold sign the Note or that the Appellant intended to make the Appellee liable on the Note. Further, there is no evidence that the Appellant ever explained to Ms. Arnold that under certain circumstances, she could be solely responsible for payment of the Note or that she could lose her home should her husband, Jeffrey Arnold die first.

On January 20, 2007, Jeffrey A. Arnold died testate in Wood County, West Virginia. Pursuant to her right of survivorship in the real property at issue, Appellee became the sole owner of the property. (Complaint, P. 4 ¶VI).

In the course of the proper and timely administration of the Estate, the Estate of Jeffrey A. Arnold was referred to Gerald R. Townsend, Fiduciary Commissioner. The Fiduciary Commissioner published notice to the Estate's creditors and established June 9, 2007 as the last date upon which the claims against the estate may be filed (the "Claims-Bar Date"). (Complaint, P. 3 ¶ XII). Appellant failed to file a claim against the Estate for payment of the debt. (Complaint, P. 8 ¶ XIIII).

The Appellee's Complaint suggested that the Estate defaulted on the subject loan. (Complaint, P. 5 ¶ XVI). However, in reality, the Estate never made any payments to the Appellant. Nor could it have. Early in the estate administration, it became clear that the Estate was not liquid and therefore had to abide by the priority of payments to creditors. Simply put, the Appellant's priority was much lower than the other creditors of the Estate, such as the Estate's administration costs, the IRS and the State of West Virginia. Appellee's Counsel notified the Appellant in a letter dated April 13, 2007 that she would no longer be making any payments on the loan and that the Appellant should file a proof of claim with the Estate. (*See*

The Estate's Response to Motion for Summary Judgment). After failing to file such a claim, Appellant directed its Trustees to foreclose on the subject Deed of Trust.[1] (Complaint, P.8 ¶ XVI). Thereafter, Counsel for Appellee demanded the Trustees cease and desist all foreclosure activities. (Complaint, P. 9 ¶ XVI). Appellee filed her Complaint for Injunctive Relief and argued that Appellant should be enjoined from foreclosure because "when, as here, the creditor is estopped from enforcing the obligation secured by a promissory note, it is likewise precluded by operation of law from enforcing the lien of the deed of trust." (Complaint, P.8 ¶ XV).

Appellant then filed its Motion for Summary Judgment seeking permission to foreclose on the real property at issue. Counsel for Appellee did not file a response to Appellant's Motion for Summary Judgment but did, however, attend the hearing and oppose said Motion for Summary Judgment. Counsel for the Estate filed a Response in opposition to Appellant's Motion for Summary Judgment. (*See* Response to Defendant Advantage Bank's Motion for Summary Judgment, P. 7 ¶ 2).

The Circuit Court's Order of August 18, 2008 denied Appellant's Motion for Summary Judgment. The Circuit Court ruled that "as a preliminary matter, there appears in this case no genuine issue of material fact and, as such, the issues raised by this Motion are ripe for summary judgment as all that remains is the question of law to be determined by the court." (Order of August 18, 2008 P. 3 ¶ II). After finding that Summary Judgment was indeed appropriate, the Circuit Court then turned to the substance of matter and stated "[a]s the Plaintiff is not obligated on the Note as it is an individual debt of the decedent, the issue becomes whether or not the Trustees may foreclose on the subject Deed of Trust when the Plaintiff is the sole

[1] On October 9, 2007, Appellee nominated David G. Palmer and Christina J. Palmer as substitute Trustees in place of the original named Trustee. (Complaint, P. 3 ¶ III).

owner of the property pursuant to the operation of the right of survivorship clause in the Deed." (Order of August 18, 2008 P. 4 ¶ III) The Circuit Court then determined that the Appellant could not foreclose against Appellee's undivided interest in the property, citing the Supreme Court of West Virginia's previous ruling in Dobbins which "the Supreme Court held that the party not signing the Promissory Note was not personally liable for and her interest in the property was not subject to the debt, even though she had signed the Deed of Trust." (Order of August 18, 2008 P. 5 ¶ I, citing the Supreme Court case of Dobbins v. Cunningham, 217 W. Va. 580, 618 S.E. 2d 589 (2005)).

V. STANDARD OF REVIEW

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). Rule 56 is "designed to 'effect a prompt disposition of controversies on their merits without resort to a lengthy trial' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." Precision Coil, 194 W. Va. 52, 459 S.E.2d at 335 (quoting Painter, 192 W. Va. 189, 451 S.E.2d at 758, n.5). Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact. See Payne v. Weston, 195 W. Va. 502, 466 S.E.2d 161, 165 (1995).

With regard to the standard that this Court employs when reviewing orders of a circuit court to grant summary judgment, it has held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Painter, 192 W. Va. 189, 451 S.E.2d 755 (1994). However,

inasmuch as the parties do not appear to disagree about the material facts of this case, as recognized by the Circuit Court, it would appear that, as a practical matter, the Court's *de novo* review in this case should be limited to the questions of law presented.

VI. DISCUSSION OF LAW

THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

The Circuit Court's Order properly understood the issue herein to be whether Appellant could foreclose on the widow's property under a Deed of Trust when that widow had not signed the Note, nor was she liable on the Note and where she had become the sole owner of the real property at issue, through her right of survivorship in the deed, upon the death of her husband, who was the sole debtor on the Note. Appellant claims that "[the Circuit Court's ruling] obscures Appellee's actual argument that foreclosure on the Deed of Trust is barred because the underlying Promissory Note is unenforceable 1) as to Appellee because she did not sign it and 2) as to the Estate because no claim was filed by Appellant." (Appellant's Brief, P. 7 ¶1). However, the Estate submits that these facts are not in controversy and as a matter of law, the Circuit Court ruled exactly on these issues in compliance with this Honorable Court's 2005 decision in Dobbins v. Cunningham, 217 W. Va. 580, 618 S.E. 2d 589 (2005).

A. APPELLANT FAILED TO MAKE A CLAIM AGAINST THE ESTATE FOR THE DEBT AND IS NOW TIME BARRED.

There is no question of fact that the Estate was being properly administered and that the Appellant failed to file a claim under the applicable statutory provisions. Appellant fully admits in its Answer, Petition for Appeal, and now its Brief of Appellant, that even though it had actual knowledge that the estate was being administered and that the time for creditors to

make their claims was running, it failed to make a claim against the estate for the unpaid balance of the note.

West Virginia Code §44-2-26, provides that:

> Every person including the state tax commissioner, having a claim against a deceased person, whether due or not, who has not, after notice to creditors has been published as prescribed in this article, presented his claim on or before the time fixed in such notice, or before that time has not instituted a civil action or suit thereon, shall, notwithstanding the same be not barred by some other statute of limitations that is applicable thereto, be barred from recovering such claim of or from the personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever; except that if a surplus remain after providing for all claims presented in due time, or on which action or suit shall have been commenced in due time, and such surplus shall not have been distributed by the personal representative to the beneficiaries of the estate, **and the claimant proves that he had no actual notice of the publication to creditors nor knowledge of any proceedings before the fiduciary commissioner**, such creditor may prove his claim by action or suit and have the same allowed out of such surplus; and, in order that such late claims if proved may be provided for, the fiduciary commissioner shall reopen his report if the same has not been returned to the county commission, or if returned, shall make and return a supplemental report: Provided, That, as to real estate, the provisions of subsection (b), section one [§ 44-2-1(b)] of this article shall apply.

W. Va. Code §44-2-26 (emphasis added). The statutory section above makes it abundantly clear that a creditor who has missed the claims deadline can only file a late claim against the estate if there is an undistributed surplus **and** the creditor can prove that he had no actual notice of the publication to creditors. In the instant matter, Appellant had actual notice of the claims period and failed to file its claim. (*See* Letter from Appellee's Counsel to Appellant dated April 13, 2007 and attached to the Estate's response to Appellant's Summary Judgment motion.) Therefore, Appellant cannot now avail itself of a late claim because it is barred under

§ 44-2-26 for having actual notice of the creditor period and its having failed to make a claim against the estate.

In addition, at the time of the Appellant's attempt to foreclose, there was no undistributed surplus in the Estate and there were a number of creditors of higher priority than the Appellant. West Virginia §44-2-21 clearly provides the order in which debts of the decedent are to be paid:

> a) If the applicable assets of the estate are insufficient to pay all claims against the estate in full, the personal representative shall make payment in the following order:
>
> (1) Costs and expenses of administration;
>
> (2) Reasonable funeral expenses;
>
> (3) Debts and taxes with preference under federal law;
>
> (4) Unpaid child support which is due and owing at the time of the decedent's death;
>
> (5) Debts and taxes with preference under other laws of the state of West Virginia;
>
> (6) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation for persons attending the decedent during his or her last illness; and
>
> (7) All other claims.
>
> (b) If the applicable assets of the estate are insufficient to pay all claims within a class, those claims within that class shall be paid on a pro-rata basis. No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.
>
> (c) Notwithstanding the provisions of subsection (a) of this section, if the payment of all funeral expenses of the decedent is provided for by an irrevocable pre-need funeral contract or trust, neither the decedent's estate nor the decedent's surviving spouse shall have any obligation for the payment of such funeral expenses.

W. Va. Code § 44-2-21. The proceeds of the sale of real estate in the Estate (which does not include the real estate at issue in this appeal) may not constitute sufficient liquid assets to pay all of the outstanding estate administration costs and expenses which have higher priority in claims against the Estate. Thus, then and now, there simply is no undistributed surplus to distribute at this time.

Next, the Appellant cites W. Va. Code §44-2-27, which provides that:

> a) Every creditor who has not presented his claim to the fiduciary commissioner before distribution of the surplus by the personal representative, or before that time has not instituted a civil action or suit thereon against the personal representative, may, if not barred by limitation, bring a civil action against the distributees and legatees, jointly or severally, at any time within two years after such distribution. But no distributee or legatee shall be required to pay to creditors suing by virtue of this section a greater sum than the value of what was received by him out of the decedent's estate, nor shall any distributee or legatee be required to pay to any one creditor a greater proportion of such creditor's debt than the value of what was received by such distributee or legatee bears to the total estate distributed. A creditor suing by virtue of this section shall not recover against such distributees and legatees the costs of his civil action.
>
> (b) Any creditor of a deceased person upon whose estate there is no administration pursuant to subsection (b), section one [§ 44-2-1(b)] of this article, may, if not barred by limitation, bring a civil action against the sole beneficiary at any time within two years after recordation of the appraisement.
>
> W. Va. Code §44-2-27.

As stated by the West Virginia Supreme Court of Appeals, when considering the two sections W. Va. Code §44-2-26 and 27 the diligent creditor is preferred over the dilatory creditor in cases where the estate does not pay out. *See* In re Reynolds' Estate, 116 W. Va. 249, 180 S.E. 6 (1935).

With regard to W. Va. Code §44-2-28, the Appellant claims that this statute trumps W. Va. Code §44-2-26 and §44-2-27, standing for the proposition that liens created by deeds of trust during a decedent's lifetime are never barred or extinguished under Chapter 44. The Appellant argues this creates some kind of "super creditor claim" that somehow trumps all of the other administrative provisions and priorities under the State's Probate laws. This would fly in the face of this Honorable Court's prior decisions that hold one must consider the order of priority set forth in W. Va. Code §44-2-21. *See* Syl. pt. 3, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.").

W. Va. Code § 44-2-28 must be read in harmony with the other probate statutes and the relevant case law as well. Furthermore, § 44-2-28 simply does not apply to the non-probate property. W. Va. Code §§ 44-2-26, 27, & 28 delineate the proper procedure and application as to claims against the estate and how they may apply to assets and distributions from the estate but not to non-probate property. It is interesting the Appellant is relying on a statute from the probate section of the West Virginia Code for its rights under its deed of trust but fails to make the distinction between probate and non-probate property.

The purpose of probate is to bring closure to an estate and to ensure that clear title can pass to subsequent owners. Accordingly, Appellant's argument that a Deed of Trust never ends would leave open the possibility that a bank could wait as long as they want to foreclose. That idea just does not make sense and ignores the very reason that our probate process exists.

A more likely interpretation of the reason that real estate claims are set out separately is to make it easier to foreclose against real property that was a part of the estate. In such a circumstance it make more sense. If the real property was a part of the decedent's estate and the creditor had made a timely claim, the debt would still be a valid obligation and a valid lien. Further, without the provision of W. Va. Code §44-2-28, a lawsuit is required to sell real estate to satisfy debts of the estate. So, in the instance of a valid debt and probate real estate, it would make sense to facilitate a foreclosure.

However, what the Appellant is suggesting here is simply a way to bootstrap a claim against non-probate property using the laws of estate administration, which are not intended to apply to non-probate property. West Virginia Code § 44-2-28 applies to probate property only and has no application to non-probate property such as the real estate at issue in the instant case. If Appellant cannot foreclose on the property under some other theory of law, it should not be able to reach this non-probate property through the laws that govern the probate estate.

B. THE CIRCUIT COURT'S DECISION IS WELL REASONED AND IN COMPLIANCE WITH WEST VIRGINIA STATUTORY AND CASE LAW IN REGARD TO REAL ESTATE AND PROBATE LAW.

What is astounding in the Appellant's argument is the way in which it seems to ignore the well reasoned decision of Judge Beane which in all ways is compliant with West Virginia statutory and case law and cites the appropriate precedents. Instead, Appellant chooses to rely on general legal principals regarding title from 19th and early 20th century and arbitrary assertions from an anonymous "Wood County property attorney" (Appellant's brief, P12, ¶3) and chooses to ignore the evolution of the law in this issue. While the Circuit Court relies on this Honorable Court's decision in Dobbins v. Cunningham, 217 W. Va. 580, 618 S.E.2d 589 (2005),

from just three years ago and the evolution of these legal issues as outlined in Dean John Fisher's law review article on the subject.[2]

Remarkably, the facts in *Dobbins* are almost exactly the same. The only difference is in *Dobbins*, the marriage ended in divorce instead of the death of a spouse. Otherwise, the facts are the same. One party signed the note and both parties signed the deed of trust. This Court in *Dobbins* held that the wife was not responsible for any of the debt owed on the promissory note, given that she did not sign the note. Thus, a joint owner of tract of land cannot be responsible for any of the debt owed on a promissory note that such joint owner did not sign, but that was signed only by other joint owner, although both joint owners signed deed of trust on the tract of land securing the loan. *See* Dobbins v. Cunningham, 217 W. Va. 580, 618 S.E.2d 589 (2005). This Honorable Court even points out the equities in favor of the wife, noting that ["the equities of this case weigh in the [wife's] favor. Prior to the partition action, the [wife] had a home, a half-interest in an 83.45 acre tract of land, and believed she had a half-interest in a successful logging business. Now the [wife] stands homeless, landless, and without a steady sources of income." Dobbins, 217 W. Va. at 582, 618 S.E. 2d at 592. The instant case has the same equities, namely that before her husband's untimely death, the widow had a nice home and means of support. Now after his death, she must contend with going back to work and receiving no real financial security from the estate. Her husband was the provider as a professional accountant, so her once steady source of income has vanished, and if the Appellant gets its way, the widow would be homeless as well.

[2] John W. Fisher, II, *If Judgment Creditor Cannot Set Asunder A Debtor Spouse's Interest In the Marital Home, What Can They Do?*, 97 W. Va. L. Rev 339, (1995).

One might ask at this point what the distinction was in *Dobbins* that allowed the partition action and the sale of the property, even thought the wife was allowed to keep her half of the proceeds unabated by any of the debt. In *Dobbins*, the casualty was a divorce and not the death of her spouse. In *Dobbins*, the partition suit was allowed because the wife was not going to be prejudiced by the sale. The marriage had ended and the marital home ceased to exist and presumptively was the subject of a property settlement in accordance with the divorce action. But the Circuit Court, in the instant case, rightfully acknowledges the distinction this Honorable Court had set out in Harris v. Crowder, 174 W. Va. 83, 322 S.E.2d 854 (1984), when it cited W. Va. Code §37-4-3, that states that a partition suit can only be granted when the interest of the other person so entitled will not be prejudiced. *See* Harris, 174 W. Va. at 86, 322 S.E.2d at 857. In the instant case, the widow would be thrown out of her marital home. You can't get more prejudiced than that! Furthermore, in *Harris*, this Court noted that "[t]hroughout the United States there appears to be widespread reluctance to allow the creditors of *one* spouse to sell the family house to satisfy debts." Harris, 174 W. Va. at 87, 322 S.E.2d at 858 . The Circuit Court recognized this Court's prior decisions in regard to prejudice and complied with both *Harris* and *Dobbins* when it held that even if the bank were allowed to foreclose, the widow would be entitled to all of the proceeds of the sale, since she was not liable on the note, and therefore would produce "an absurd result and the Court finds no reason to allow this to occur." (Court Order, P7, ¶1).

This aspect of the instant case goes to the heart of the matter at issue and the problem with Appellant's security interest in the property in question. This is why these facts are such a narrow issue. The holding in this case does not suggest that all Deeds of Trust that are signed by a spouse who is not also on the note are invalid or worthless. If the obligated spouse

was still alive and a partial owner of the real estate, a bank would have a secured interest in that debtor's interest in the property. If the bank could otherwise, foreclose on the property, only the proceeds of the debtor spouse could be applied to the debt. The Dobbins decision made that clear. The non-debtor spouse would be entitled to his or her share unencumbered by the debt. In the instant case, the debtor spouse (or his estate) no longer has an interest in the real property that can be applied to the debt! As Judge Bean correctly pointed out, under Dobbins, the widow would be entitled to all of the proceeds from the sale of the home. To hold otherwise, would make the widow now entirely at risk for the loan payment, a result that goes squarely against the federal banking regulation raised by Appellant for the first time in its Brief.

C. THE FEDERAL BANKING ARGUMENT WAS NOT RAISED IN THE CIRCUIT COULD AND SHOULD BE BARRED NOW.

Appellant continues to raise new arguments and assert new facts upon Appeal that were not raised, nor any evidence proffered for, in the court below and should now be barred. In Whitlow v. Bd. Of Educ. Of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993), this Honorable Court gave the following reasons for refusing to consider new issues on appeal:

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Arguments related to Federal Banking Regulations 12 CFR § 202.7 (Equal Credit Opportunity – "Reg. B") were not raised in the circuit court and should be barred from being raised for the first time before the Appeals Court.

However, Reg. B would not be dispositive in the matter at hand anyway. The issue is a West Virginia state law issue and not determined by federal regulations. While it is true that Reg. B governs the actions of the banking industry, Reg. B contemplates that state law governs the transaction and on its face allows for the bank to take the steps that are necessary under state law to secure the loan. Even if this Honorable Court were to consider Reg B in regard to this matter, it would be able to fully reconcile both West Virginia law and Reg B by determining that the Circuit Court's decision is in compliance with West Virginia case law and therefore also complies with requirements under Reg B.

Both the Appellant's Brief and the Amici Curiae Brief recognize that Reg. B authorizes a Bank to require a spouse to sign a promissory note if it is necessary under state law for the full collateralization of the loan. The purpose of Reg. B was to avoid discriminatory lending, and in this specific subject, discriminating against non-married individuals as being less credit worthy. Therefore there is clearly a prohibition for requiring a spouse to sign just to make the loan if the debtor can stand alone in regard to his or her credit worthiness.

But the security in the collateral is another issue. That is why the regulation provides for the creditor to be able to obtain the signature of a spouse on the note if it is required under that state's law for the creditor to protect its security interest in the collateral.

> "(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings." 12 CFR § 202.7 (emphasis added).

The provision states when the law of the state requires such signature to enforce the note and the collection of the collateral it is perfectly acceptable and not a violation of the Act. Further, in

light of this Honorable Court's decisions in the past in matters in which the signers on the deed of trust and note are not the same, it at least could be "reasonably believed to be necessary" to have all parties with an interest in the collateral sign the note as well. The case law that suggest this is exactly what the Circuit Court was following in its decision.

Finally, the Estate does not object to the suggestion in the Amicus Brief to apply this ruling prospectively.

VII. PRAYER FOR RELIEF

The Circuit Court's decision is well reasoned and in compliance with West Virginia statutory law and applicable case law. W. Va. Code § 44-2-28 must be read in harmony with the other probate statutes and the relevant case law as well. Furthermore, § 44-2-28 simply does not apply to the non-probate property. W. Va. Code §§ 44-2-26, 27, & 28 delineate the proper procedure and application as to claims against the estate and how they may apply to distributions from the estate but not to non-probate property. The Circuit Court's order harmonizes the conflicting issues of law between, probate property, non-probate property, the appropriate administration of the estate and the Appellants limitation in its Deed of Trust and as such, the Appellant's Appeal should be denied and Circuit Court's Order upheld.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellee, Jeffrey Scott Arnold, Executor of the Estate of Jeffrey A. Arnold, Deceased, hereby certifies that on the 30th day of April, 2009, he served the foregoing and hereto annexed ***Response Brief on Behalf of Jeffrey Scott Arnold, Executor of The Last Will and Testament of Jeffrey A. Arnold, Deceased*** upon counsel of record or other parties by depositing the same in the United States Mail, postage prepaid, addressed to:

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